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Art Thoms, Scott Lungner, and Zachary Hoyer

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEVIN WALKER,

Plaintiff,

-vs-

CITY OF HAYWARD, OFFICER ART
THOMS, OFFICER SCOTT LUNGER, and
OFFICER ZACHARY HOYER,
individually and their official capacities;
AMERICAN DISCOUNT SECURITY; and
DAVID WARDAK aka DAVID WARDUK,

Defendants.

Case No.: C 07 -06205 (TEH)

REQUEST FOR JUDICIAL NOTICE;
MEMORANDUM OF POINTS AND
AUTHORITIES; (PROPOSED) ORDER
[F.R.C.P. 12(b)(1), (6)]

Date: 2/11/08 (Monday)

Time: 10:00 a.m.

Crtrm:12

450 Golden Gate Avenue, 19th Fl.
San Francisco, California

The Honorable Thelton E. Henderson

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 11, 2008 at 10:00 a.m., in Courtroom 12, located of 450 Golden Gate Avenue, 19th Floor, San Francisco, California, defendants City of Hayward ("City"), Art Thoms ("Thoms"), Scott Lungner ("Lungner"), and Zachary Hoyer ("Hoyer") request that this Court take judicial notice of Exhibits B and C, attached to the Declaration of Randolph S. Hom, which are true and correct copies of plaintiffs' claim presented to the City on December 4, 2007, and the City's Notice of Rejection of Claim issued on December 20, 2007, and also referenced in defendants' motion to dismiss which is filed concurrently with this request for judicial notice. This request is made pursuant to Federal Rules of Evidence Code Section 201, and the decision in Mullis v. United States Bank. Ct., 828 F.2d

1 1385, 1388 (9th Cir. 1987). [Plaintiff alleged that “Plaintiff timely filed his notice of claim with
 2 the CITY OF HAYWARD asserting the state law causes of action against Defendants
 3 HAYWARD, THOMS, LUNGER, and HOYER” (Plaintiff’s complaint at 6:13-15.)
 4 Nevertheless, the Court need not accept as true the allegations that conduct facts which may be
 5 judicially noticed by the Court.]

6 The request for judicial notice will be based upon this Notice, the Memorandum of
 7 Points and Authorities, the Declaration of Randolph S. Hom, the pleadings and records contained
 8 in the court file, the Motion to Dismiss filed and served concurrently with this notice, and with
 9 any other oral and documentary evidence presented to the Court at the time of hearing.

10 MEMORANDUM OF POINTS AND AUTHORITIES

11 **I. THE COURT MAY JUDICIALLY NOTICE OFFICIAL GOVERNMENT RECORDS 12 WHICH ARE CAPABLE OF READY AND ACCURATE DETERMINATION AND 13 WHICH CONTRADICT FACTUAL ALLEGATIONS ON THE FACE OF THE 14 PLEADINGS**

15 Federal Rules of Evidence Section 201(b)(2) allows the court to judicially notice facts
 16 “capable of accurate and ready determination by resort to sources whose accuracy cannot
 17 reasonably be questioned.” On a motion to dismiss, the court may take judicial notice of matters
 18 of public record outside the pleadings. MGIC Indemnity Corp. v. Weisman, 803 F.2d 500, 504
 19 (9th Cir. 1986). Pursuant to Federal Rules of Evidence Section 201, a court may take judicial
 20 notice of a city’s official records. Grassroots v. County of San Francisco, 1994 U.S. Dist LEXIS
 21 15130 (N.D. CA 1994); see also Poway Unified School District v. Superior Court, 62
 22 Cal.App.4th 1496 (1998). It should be noted that the court need not accept as true the allegations
 23 that contradict facts which may be judicially noticed by the court. Mullis v. United States Bank,
 24 Ct., 828 F.2d 1385, 1388 (9th Cir. 1987).

25 Accordingly, all documents maintained by the City relating to plaintiff’s claim,
 26 including his claim presented to the City on December 4, 2007, and the City’s Notice of
 27 Rejection of Claim issued on December 20, 2007 are within the scope of Federal Rules of
 28 Evidence Section 201. Moreover, the content of the factual allegations in said documents
 including the date of presentation of the claim, and the issuance date of the City’s Notice of

1 Rejection of Claim are not reasonably subject to dispute. Federal Rules of Evidence Section 201.

2 **II. CONCLUSION**

3 Based on the foregoing, defendants respectfully requests that this court take judicial
4 notice of the aforementioned exhibits.

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6 DATED: January 2, 2008

MICHAEL J. O'TOOLE, City Attorney

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9 By: /S/
10 RANDOLPH S. HOM, Assistant City Attorney,
11 Attorneys for Defendants City of Hayward, Art
12 Thoms, Scott Lunger, and Zachary Hoyer
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